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NOTES.

It is with great sorrow that we learn of the death of John W. Parks, who was formerly a member of the Editorial Board of the REVIEW. His work as an editor, as a practicing lawyer, and as an instructor in the Columbia Law School inspired the admiration and confidence of his associates. In his death, all who knew him will feel a sense of personal loss.

CONSTITUTIONALITY OF THE NEW YORK WORKINGMEN'S COMPENSATION ACT.—The new Workingmen's Compensation Act[1] of New York imposes upon employers in certain extrahazardous occupations an obligation to compensate workmen or their next of kin for injuries resulting from accidents to which risks inherent in the business have contributed. This statute is obviously an attempt on the part of the

[1]Laws 1910 Ch. 674.

legislature completely to abolish the doctrine of assumption of risk and to substitute an absolute liability for the liability based upon negligence which is recognized at common law. In sustaining the constitutionality of this measure the recent case of *Ives* v. *South Buffalo Ry. Co.*, 124 N. Y. Supp. 920, suggests an inquiry into the limitations imposed by the Fourteenth Amendment upon the power of the legislature thus to modify the substantive law.

The due process clause is of course designed to safeguard only the vested rights of life, liberty and property, and, inasmuch as no property rights are recognized in the rules of the common law,[2] it is at least arguable that the creation of a new liability raises no question of due process so long as provision is made for the determination, by proper judicial proceedings, of the facts upon which the liability is made contingent.[3] Very naturally, however, this view has seldom commended itself to our judiciary. The enforcement of a judgment pursuant to the statute does unquestionably involve a taking of property and, as the court's power to authorize the issue of an execution is derived solely from the act of the law-making body, it has been generally assumed that the constitutionality of statutes conferring such power must be decided in accordance with the tests applied under the due process clause.[4]

Such a statute even if involving an impairment of property rights is not a taking without due process of law if its enactment is a lawful exercise of the police power. The rule of construction is well established that an act, although seriously infringing vested rights, will not be declared unconstitutional unless it appears, from matters of which the court can take judicial notice, either that its purpose is clearly beyond the legitimate objects of the police power or that it has no real or substantial relation to that object or that the particular means adopted to attain the desired end is "palpably an arbitrary invasion of vested rights."[5] In applying these vague tests to particular legislative acts, the courts have, as in other fields involving the application of the due process clause, carefully refrained from specific definition, but "proceeding by the judicial process of exclusion and inclusion" have decided the individual cases on their own merits, not only in accordance with precedent but also in the light of contemporaneous social and economic conditions.[6] When considering legislation affecting the public health and safety, however, they have been especially liberal in sustaining acts which, like the New York Statute, are calculated to minimize the evils of extrahazardous undertakings even though entailing the

[2]See Wynehamer *v.* People (1856) 13 N. Y. 378; Mathews *v.* Ry. Co. (1893) 121 Mo. 298; U. C. G. M. Co. *v.* Firstbrook (1906) 36 Colo. 498; Fitzgerald *v.* Ry. Co. (Vt. 1891) 13 L. R. A. 70.

[3]Jones *v.* Brim (1896) 165 U. S. 180; McCandless *v.* Richmond & D. R. Co. (1892) 38 S. C. 103; Holmes *v.* Murray (1907) 207 Mo. 413.

[4]See Jenson *v.* Un. Pac. Ry. Co. (Utah 1889) 4 L. R. A. 724.

[5]Halter *v.* Nebraska (1906) 205 U. S. 34; Mugler *v.* Kansas (1887) 123 U. S. 623; Powell *v.* Pennsylvania (1887) 127 U. S. 678; Hemnington *v.* Georgia (1895) 163 U. S. 299; Booth *v.* Illinois (1901) 184 U. S. 425; Jacobson *v.* Massachusetts (1904) 197 U. S. 11; Tenement House Dept. *v.* Moeschen (1904) 179 N. Y. 325; Health Dept. *v.* Rector etc. (1895) 145 N. Y. 32. But see *In re* Jacobs (1885) 98 N. Y. 98.

[6]See Kiley *v.* Chic. etc. Ry. Co. (1909) 138 Wis. 215; Gulf & S. F. Ry. Co. *v.* Ellis (1896) 165 U. S. 150; Muller *v.* Oregon (1907) 208 U. S. 412; Mo. Pac. Ry. Co. *v.* Mackey (1887) 127 U. S. 200, 210.

expenditure of large sums of money,[7] and have already recognized the necessity of special legislative protection of this general character as a means of equalizing the positions of employee and employer in the field of contract.[8]

It would seem, therefore, that if the statute in question is unconstitutional it must be because the particular form of protection adopted, in imposing a liability upon one who is without fault, is so unusual and arbitrary that it may be condemned as unknown to the law of the land. The underlying principle, however, that inevitable loss should be borne not by the person on whom it may happen to fall but by the one who profits by the dangerous business, has in another connection been judicially declared to embody a very tenable idea of justice.[9] That the imposition of an absolute liability is, moreover, not *per se* unconstitutional is apparent from the fact that liabilities of this kind are not unknown even to the common law.[10] Furthermore, modern legislation has in many fields already enlarged the scope of absolute liability and the courts have sustained not only statutes imposing such a liability for the proximate results of voluntary acts,[11] but also those abrogating the law of proximate cause and allowing a recovery even against persons whose acts contribute very remotely to produce the injury in question.[12] The principle deducible from the cases seems to be that the requirements of the due process clause are satisfied by the mere existence of some voluntary causal relation and that an act will be declared unconstitutional only when it imposes a liability upon persons in no way connected or connected only involuntarily with the circumstances giving rise to the liability.[13] Fault is, of course, the general basis of liability at common law, but, so far as the constitution is concerned, it is indispensable as a criterion only in so far as its existence is necessary to establish a causal connection between the acts out of which the liability arises and the injury sought to be remedied by the legislature.

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[7]Tenement House Dept. *v.* Moeschen *supra;* Health Dept. *v.* Rector *supra.*

[8]See Holden *v.* Hardy (1897) 169 U. S. 366; Pittsburg etc. R. R. Co. *v.* Lightheiser (Ind. 1906) 78 N. E. 1033; but see Lochner *v.* New York (1904) 198 U. S. 45.

[9]See Hart *v.* Western R. R. Co. (Mass. 1847) 13 Metc. 99.

[10]See R. R. *v.* Zernecke (1901) 183 U. S. 582.

[11]Liability for fires caused by locomotives. St. Louis etc. Ry. Co. *v.* Mathews (1896) 165 U. S. 1; Mathews *v.* Ry. Co. *supra;* Ry. Co. *v.* Kreager (1899) 61 Ohio 312; Grissell *v.* Housatonic R. R. Co. (1887) 54 Conn. 447. Liability for injury done to highway by cattle. Brim *v.* Jones (1895) 11 Utah 200. Liability for damage caused by dangerous animals irrespective of *scienter.* Holmes *v.* Murray *supra.*

[12]Liability of lessor of premises used for sale of intoxicating liquors for damage caused by a person intoxicated thereby. Bertholf *v.* O'Reilly (1878) 74 N. Y. 509. Liability of lessor of premises used for gambling purposes for money lost. Marvin *v.* Trout (1905) 199 U. S. 212. Statutes making railroads insurers of the safety of their passengers seem to come nearest to the New York Statute. Union Pac. Ry. *v.* Porter (1893) 38 Neb. 226; Galveston etc. Ry. *v.* Piper Co. (Tex. 1909) 115 S. W. 107. Although upholding them on special grounds, the Supreme Court intimated unequivocally that there were no constitutional objections to such a statute. See Chicago etc. Ry. *v.* Zernecke (1901) 183 U. S. 582.

[13]Camp *v.* Rogers (1877) 44 Conn. 29; Ohio etc. Ry. Co. *v.* Lackey (1875) 78 Ill. 55.

The elimination of negligence as a basis is not, therefore, fatal to the statute, provided the required chain of causation is supplied by other elements.

In fact, where there are strong considerations of public policy, even a causal relation may be unnecessary.[14] Assuming, however, that some source of causation is essential, it is submitted that in the occupations affected by the New York Statute this requirement is to be found in the voluntary employment of the dangerous instruments and agencies from which the injury results. The statute may, perhaps, be obnoxious to state constitutional provisions guaranteeing a trial by jury, in that the liability imposed is measured by a fixed scale of compensation, but it seems safe to say that under the Fourteenth Amendment, at least, its constitutionality is reasonable clear.

MEASURE OF DAMAGES FOR CONVERSION OF STOCK BY A STOCK-BROKER.—The relation between stockbroker and customer in margin transactions is an anomalous one in law. The customer usually pays only a small part of the purchase price, the balance being advanced by the broker, who holds the stock as security for the loan. The latter stands in a fiduciary relation toward the purchaser and consequently is bound to exercise the greatest good faith.[1] Moreover, although the broker takes legal title to the stock in his own name, they also sustain a relation of pledgor and pledgee.[2] As a result, any unauthorized sale or other unlawful disposition of the stock by the broker is treated as a conversion, and subjects him to an action in tort.[3]

The measure of damages in such cases is governed by two fundamental principles. On the one hand, the owner must be fully indemnified for the injury sustained; on the other hand, the wrongdoer must not be permitted to derive any benefit or advantage from his act and consequently he must be compelled to refund all profits realized from such misappropriation.[4] While in the case of chattels having a more or less fixed value, the plaintiff is sufficiently recompensed by being allowed the value of the article at the time of the conversion, yet where the property is of such a nature that its price is subject to constant fluctuations, this measure of damages would not afford him full compensation if the market rises after the conversion.[5] As it is usually the purpose of the purchaser to speculate on the rise of the market rather than to buy the stock as a permanent investment, the real injury in that instance consists in the wrongful sale of the property at an unfavorable moment selected by the broker himself, and the consequent loss of profits that might have been gained by the

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[14]See Chicago *v.* Cement Co. (1899) 178 Ill. 372; People *v.* Hill (Ill. 1896) 36 L. R. A. 634.

[1]Dos Passos, Stock-Brokers and Stock-Exchanges 102; Haight *v.* Haight & Freese Co. (1906) 112 App. Div. 475, aff'd in 190 N. Y. 540; see Brass *v.* Worth (N. Y. 1863) 40 Barb. 648.

[2]Dos Passos, Stock-Brokers and Stock-Exchanges 111-115; Baker *v.* Drake (1876) 66 N. Y. 518; Gruman *v.* Smith (1880) 81 N. Y. 25; Learock *v.* Paxson (1904) 208 Pa. St. 602; 8 COLUMBIA LAW REVIEW 488.

[3]Markham *v.* Jaudon (1869) 41 N. Y. 235.

[4]Suydam *v.* Jenkins (N. Y. 1850) 3 Sand. Super. Ct. 614.

[5]Galligher *v.* Jones (1889) 129 U. S. 193; Suydam *v.* Jenkins *supra; contra* Boylan *v.* Huguet (1873) 8 Nev. 345.